

Features

The evidential dangers of CCTV evidence — How slow motion replays can distort criminal liability

By Joe Stone QC¹

1. Relevant Background

CCTV evidence is often feted as the best evidence of criminal liability in a trial because it is a real time indicator of events as they unfold and on the face of it not open to dispute. However in a trial there are two important limitations to this evidence. Firstly, there may be issues as to what happened immediately before the CCTV images that bear on the interpretation the jury must make of the footage and which were not caught on CCTV. Secondly, there may be issues as to what is taking place at the same time as the video footage but which is not caught on camera but is important for understanding the TV images. In any event, despite these dual limitations, the prosecution will often invite the jury to draw evidential inferences from the footage that go directly to the issue of the mental intent of the participants at that time.

Recent ground-breaking research from the United States has shown that criminal practitioners should be alive to the evidential dangers of replaying such probative CCTV evidence in slow motion. The US researchers believe that the slow motion version is giving observers (the jury) the false sense that those carrying out the acts on tape have more time to think and deliberate and they therefore infer there is *increased intent* in the violent actions than may otherwise be merited in reality.

Given the increasing prevalence of CCTV in UK criminal trials this is an issue which will have an impact on many cases in a very direct and immediate way. This is especially so in joint enterprise murder trials with the importance now placed on the issue of intent in the post-*Jogee* era.

2. Recent United States Academic Research — Significance and Importance

Eugene M. Caruso, Zachary C. Burns and Benjamin A. Converse have recently published a paper entitled "*slow motion increases perceived intent*".¹ The lead author Professor Eugene Caruso from the University of Chicago, who specialises in behavioural science, points to the general significance of the research. They write:

"When determining responsibility for harmful actions, people often consider whether the actor behaved intentionally. The spread of surveillance cameras, "on officer" recording devices and smart phone video makes it increasingly likely that such judgements are aided by video replay. Yet little is known about how different qualities of the video such as replay speed affect human judgment. We demonstrate that slow motion replay can systematically increase judgements of intent because it gives viewers the false impression that the actor had more time to premeditate before acting. In legal proceedings these judgements of intent can mean the dif-

ference between life and death. Thus any benefits of video replay should be weighed against its potentially biasing effects."

The importance of the research is that CCTV videos, by their very nature, allow the jury repeated viewings in a relaxed and informal setting. However, Professor Caruso states that:

"Because video affords repeated viewings, it can augment the limits of human attention, visual processing and memory. Because video can be slowed down, it also provides the ostensible benefit of giving people a better look at real time events that happened quickly in a chaotic environment. Although slow motion replay may be intuitively appealing for this reason, we demonstrate that slow motion replay compared with regular speed replay produces systematic differences in judgments of intent."

3. An example from the US research study

The authors carried out four studies in a number of different circumstances but the criminal example was the most revealing. The participants in the study were told to imagine themselves as jurors in a criminal trial and saw a real surveillance video (with an accurate digital display of elapsed time) depicting five seconds of an attempted robbery that ended with the assailant shooting a store clerk. Participants were randomly selected to watch the clip at "*regular speed*" or "*slow motion*" (2.25 times slower than regular speed). Participants then indicated whether the person with the gun shot with wilful, deliberate and premeditated intent to kill. They were also asked how much time they thought the shooter had to assess the risk before he fired. As expected, the participants who saw the slow motion (as opposed to regular speed) video felt that the action was performed with

"more of a wilful, deliberate and premeditated intent to kill and were more likely to conclude that the person with the gun shot with the intention to kill".

Slow motion replay alone was found to triple (3.42) the odds that the jurors would begin the deliberation phase ready to convict. Slow motion viewers also felt the shooter had more time than did regular speed viewers. Of significant and serious concern was the finding that mock juries that saw both the slow and regular speed version were still 1.55 times more likely to agree the first degree murder verdict than those that just saw the normal speed. In addition, the study found that even where the images had a time display sequence this still did not remove the subjective perception that the actor in the clip had more time to think than he did in reality.

¹ Proceedings of the National Academy of Sciences, 17 May, 2016. See <http://www.pnas.org/content/113/33/9250.abstract>

4. A practical example from US Case law

In a recent case before the Supreme Court of Pennsylvania² this issue was tested. The facts arose from a 2009 murder trial in which prosecutors presented a slow motion surveillance video of John Lewis fatally shooting a Philadelphia police officer during an armed robbery. The prosecution case convinced jurors that the shooting was premeditated, warranting a charge of first degree murder and possible death by lethal injection, rather than reflexive, warranting a charge of second degree murder and life in prison.

On appeal the defence argued that the slow motion tape artificially stretched the relevant time period creating a "false impression of premeditation". The prosecution responded that the jury saw both regular and slow-motion video and could not be biased because jurors were fully informed (by a superimposed display) that Lewis shot the officer approximately two seconds after seeing him at the door.

The Supreme Court of Pennsylvania dismissed the appeal on the basis that:

- (a) the jurors saw both the regular and slowed down versions;
- (b) the slow motion tape had a digital display of time elapsed; and
- (c) the slow motion version was more probative than prejudicial.

The appellant's 8 June 2014 execution date was stayed to allow the exhaustion of appeals. At the time of writing he is currently on death row.

5. Practitioners Perspective — Impact of the research and impact on fairness of the trial process

The concern identified by the research is that, whilst a slow motion replay can present a superior version of the physical actions (*actus reus*) when committing the crime, it can also give rise to a false perception of the true mental state (*mens rea*) at the material time. Whilst there are obvious

benefits from the former there are serious concerns about the latter. Challenges to the admissibility of video evidence *in toto* are unlikely to succeed due to the cogency of this type of evidence. The twin rationale of the Supreme Court in Pennsylvania, whilst attractive, does not address the subliminal prejudice that the jury had when watching the slow motion replay as identified by the empirical findings of the US research.

The solution would appear to be providing appropriate expert evidence for the jury so that they are aware of these subliminal dangers and they can assess them in a sophisticated way being alert to the benefits/dangers of watching a slow motion replay and inferring true criminal intent. This could be reinforced by an appropriately tailored judicial direction with warnings as to the potential dangers associated with this sort of evidence.

This research will potentially provide a useful empirical base for complementing video evidence with appropriately sourced expert evidence to allow the jury to be aware of the evidential dangers of seeing images in slow motion and drawing inappropriate inferences. This will be particularly important in future criminal trials where a main plank of the prosecution case turns on CCTV evidence on which to infer intent.

As Professor Caruso points out:

"Therefore, in determining whether, and under what conditions, slow motion evidence should be admissible in court, its potential benefits must be weighed against its potential costs. Although we agree that slow motion may enhance the jury's understanding of the actions in question, including the *actus reus* and any mitigating or aggravating contextual events, our results underscore that under some conditions it may "do the opposite" for the jury's understanding of actors' mental states (*mens rea*). The relative impact of this tradeoff under various potentially moderating conditions, including the number, order, and exact speed of replays, remains open for investigation, but even the possibility of such a tradeoff demands empirical attention ... It seems imperative that an empirical understanding of the factors that contribute to assessments of intent inform the life-or-death decisions that are currently based, in part, on the intuitions of lawmakers and their tacit assumptions about the objectivity of human perception."

² *Commonwealth of Pennsylvania (Appellee) v Lewis M Jordan aka John Lewis (Appellant)*, 65A.3d 318 (2013).

The Criminal Liability of Directors Whose Companies Collapse

By J.R. Spencer¹

As the name suggests, limited liability exists to enable those who run businesses to limit their personal liability to the money they put into them – thereby ensuring that they do not themselves go bankrupt if the business fails. Though companies often fail through sheer bad luck, in some cases the reason is bad management – one form of which is dissipating the assets of the company to the point where it can no longer meet its obligations, sometimes be-

cause those in charge are treating the company's assets as their own. In civil law, commercial irresponsibility of this sort can enable the veil of corporate personality to be pulled aside, so obliging those who caused the company's collapse to make good the losses caused by it. In such cases the liquidator of the failed company can bring a range of claims against the directors on the company's behalf: for damages for misfeasance or breach of their du-

¹ I am grateful to my colleague Dr Marc Moore for his help. All remaining errors are my own.